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IN THE

Supreme Court of the United States

BARBARA GRUTTER, *Petitioner,*

v.

LEE BOLLINGER, *et al., Respondents,*

and

KIMBERLY JAMES, *et al, Respondents.*

On Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. and the AMERICAN CIVIL LIBERTIES UNION as *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS*

Interest of *Amici*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation established under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights through the prosecution of lawsuits and to provide legal services to blacks suffering injustice by reason of racial discrimination. For six decades, LDF attorneys have represented parties in litigation before this Court and the lower courts involving race discrimination and various areas of affirmative action. LDF believes that its experience in and knowledge gained from such litigation will assist the Court in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has played an active role in the battle for racial justice and has long supported the constitutionality of affirmative action in appropriate circumstances, including filing a brief as amicus curiae in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Summary of Argument

This country has journeyed a long and painful road toward racial integration that this case now threatens to destroy. For many African Americans, the force of this nation's sordid and

*Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. *Amici* are counsel for defendant-intervenors in the companion case, *Gratz v. Bollinger*. No counsel for any party in *Grutter v. Bollinger* authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

all too recent history of apartheid still blocks their path. If there is any hope for this country to continue to make racial progress, it lies, at least in part, in the unique ability of colleges and universities to bring together persons of all racial backgrounds to achieve the educational benefits of diversity and, ultimately, to create a more just, racially integrated society.

More than 300 years of slavery, segregation, and invidious discrimination by public and private actors have produced a systemic racial hierarchy that continues to this day. Numerous studies document continuing widespread racial inequality in virtually every aspect of our society, including education, employment, income, housing, health care, life expectancy, criminal justice, and in the accumulation of wealth. These studies demonstrate the impact that race has in molding the opportunities, experiences, and outlook of the overwhelming majority of African Americans, including the black middle class. The impact of race stretches across all economic strata and extends even to those arguably best positioned to capture the benefits of race-neutral policies. While class is an important factor in accounting for opportunity, it is demonstrably incorrect at this relatively early stage in our country's progress on race to assert that class alone uniquely shapes economic, social, and political opportunity in this country. In short, race matters, significantly — not because it should, but because it does.

Yet the Court's jurisprudence, including notably its discussion of "societal discrimination" in *Bakke*,[1] has cast a pall over the ability of state and local actors to remedy voluntarily the powerful imprint of racial discrimination on our society. The Court's affirmative action cases refer only in passing, if at all, to our country's undeniable and tragic history of racial oppression. The cumulative, inter-generational consequences of such racial subordination are dismissed as mere "societal

[1] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

discrimination," for which no institutional actor may be held accountable, even those that have been complicit in perpetuating racial disadvantage.

A principal objective of the Fourteenth Amendment was to mitigate the enormous burdens of African Americans emerging from slavery. It is a perversion of its purpose to prohibit modest state efforts, such as the University of Michigan Law School's admissions program, to redress systemic racial inequity.

ARGUMENT

> *It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.*

Justice Thurgood Marshall, in his *Bakke* dissent[2]

I. Race-Sensitive Admissions Policies Further the Compelling Goals of Diminishing the Effects of Deepening Racial Segregation and of Preserving Opportunities in Higher Education for African Americans

Racial segregation and isolation continue to be a menace in

[2] 438 U.S. at 401-02.

this society, producing and perpetuating sharp disparities in the quality of life and opportunities for advancement of African Americans. Their manifestation in the continued scourge of residential segregation leaves institutions of higher education as one of the few venues for meaningful cross-racial interaction.[3]

In the context of primary and secondary schools, this Court has already all but abandoned the judicial task of requiring school districts to remedy racial segregation, severely limiting the circumstances, means, and duration of desegregation remedies. *See e.g.*, *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991); *Milliken v. Bradley*, 418 U.S. 717 (1974). Even in so doing, however, it has acknowledged that "the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated." *Freeman*, 502 U.S. at 490.

Voluntary race-conscious admissions policies by colleges and universities remain one of the sole avenues for seeking to mitigate the stubborn vestiges of past wrongs, ameliorating the effects of ongoing discrimination, and increasing the participation of all members of our society. Indeed, this Court, in *Shaw v. Reno*, 509 U.S. 630 (1993), stated that our Constitution encourages us to weld together various racial and ethnic communities, and to avoid the racial balkanization that has plagued other nations. *Id.* at 648-49. *See also Miller v. Johnson*, 515 U.S. 900, 911 (1995). Race-sensitive admissions policies strive to do just that by fostering racial integration in our nation's schools and interaction between individuals from

[3]*See generally* ERICA FRANKENBERG & CHUNGMEI LEE, HARVARD U., RACE IN AMERICAN PUBLIC SCHOOLS (2002), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/reseg_schools02.php.

diverse backgrounds.

Indeed, studies show that meaningful cross-racial interaction in institutions of higher learning has significant social and educational benefits. The more racially diverse a student body, the more likely that students will socialize across racial lines and talk about racial matters.[4] These interactions have a positive impact on student retention, overall college satisfaction, and intellectual and social self-confidence among all students.[5] Faculty have also reported that racial and ethnic diversity in the classroom helps students broaden the sharing of experiences, raise new issues and perspectives, confront stereotypes relevant to social and political issues, and gain exposure to perspectives with which they disagree or do not understand.[6]

This Court noted over fifty years ago that law school provides a particularly important environment for meaningful cross-racial interaction:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the

[4]*See, e.g.*, Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, *in* DIVERSITY CHALLENGED 175, 183 (Gary Orfield and Michael Kurlaender eds., 2001). *See also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER 232 (1998) (56% of white matriculants and 88% of black matriculants of selective colleges and universities who enrolled in 1989 indicated that they "knew well" two or more classmates of the other race).

[5]*See* Chang, *supra* n. 4.

[6]Roxane Harvey Gudeman, *Faculty Experience with Diversity*, *in* DIVERSITY CHALLENGED *supra* n. 4, at 251, 271. *See also* Brief *Amicus Curiae* of the Equal Employment Advisory Council in Support of Neither Party, *Grutter v. Bollinger* (No. 02-241).

interplay of ideas and the exchange of views in which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1950). Given the deep racial isolation that still exists in our society, such exchange of views between individuals of diverse racial and ethnic backgrounds is a critical life tool for *all* students.[7]

In the absence of other means for redressing systemic racial disparity, Justice Powell's opinion in *Bakke* has been crucial to opening up opportunity for African Americans and other racial minorities, in a way that has helped begin to create a pipeline of racially diverse leaders and has fostered the fuller participation of previously dispossessed segments of our society. It is critical that colleges and universities retain the limited ability to rely on race, not only to achieve the educational benefits of diversity but also so that such institutions may continue the long road toward a more just and equitable society.

II. Historical Racial Oppression by Governmental and Private Actors and Ongoing Discrimination Continue To Affect Significantly the Lives and Opportunities of African Americans

Any meaningful evaluation of the need for race-sensitive admissions policies at the University of Michigan or at any other college or university must first take account of the central role that slavery, racial segregation, and systematic racial oppression by public and private actors have played in depriving generations of African Americans of social, political, and economic opportunity, while concurrently according profound advantages to whites.

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[7]White students have been found to have a particularly enriching experience, since they are so likely to have grown up with little interracial contact. Gary Orfield & Dean Whitla, *Diversity in Legal Education, in* DIVERSITY CHALLENGED *supra* n. 4, at 143, 172.

A. Slavery and Jim Crow Constituted An Unbroken Chain of Racial Oppression That Remained Intact Until the Second Half of the Twentieth Century

From the framing of the Constitution, governmental and private actors legitimized and strengthened a system of apartheid that enslaved African Americans.[8] The original Constitution sanctioned and preserved the institution of slavery;[9] Congress passed laws that bolstered slavery;[10] and federal and state courts perpetuated the subjugation and dehumanization of even free blacks through decisions that concretized racial oppression.[11] The most abhorrent of these cases was *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), which eviscerated any real distinctions between slaves and free blacks.[12]

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[8]*See, e.g.*, RICHARD KLUGER, SIMPLE JUSTICE 27-28 (1975).

[9]*See* U.S. CONST. art. I, § 9 (providing for the importation of slaves until at least 1808); U.S. CONST. art. IV, § 2 (capture and return of slaves to their masters); U.S. CONST. art. IV § 4, art. I, § 8 (suppression of slave rebellions); U.S. CONST. art. I, § 9 (barring taxes on exports produced by slaves); U.S. CONST. art. I, § 2 (treating slaves as three-fifths of a person), *generally amended by* U.S. CONST. amends. XIII, XIV, XV.

[10]The Fugitive Slave Law of 1850 empowered the federal government to apprehend fugitives. *See, e.g.*, BENJAMIN QUARLES, THE NEGRO IN THE MAKING OF AMERICAN HISTORY 107 (3d ed. 1987). In most Southern states, free blacks could not hold public office, vote, testify against a white person, use a firearm, freely assemble, or travel freely between the states. *Id.* at 87-88.

[11]*See, e.g., Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842); *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841); *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 206 (1850).

[12]All blacks were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . ." 60 U.S. (19 How.) at 407.

Even after the abolition of slavery and the ratification of the Fourteenth Amendment in 1868, public and private actors maintained a strict racial caste system that subjugated African Americans in every way.[13] The Hayes-Tilden Compromise of 1877, which authorized the withdrawal of federal protection of former slaves,[14] removed the last obstacle to reinstating a system of white supremacy in the South. Southern whites embarked upon widespread lynching and terrorism against blacks,[15] and a campaign of voter intimidation denied blacks the right to have any voice in the political process.[16] State legislatures approved voting requirements specifically designed to eliminate the black vote, such as poll taxes and literacy

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[13]In the American racial hierarchy, blacks have long endured a particularly virulent form of antagonism and persecution unmatched by other racial and ethnic groups. *See, e.g*, DAVID R. ROEDIGER, THE WAGES OF WHITENESS 14 (rev. ed. 1999) ([T]he white working class, disciplined and made anxious by fear of dependency, began . . . to construct an image of the Black population as 'other'—as embodying the preindustrial, erotic, careless style of life the white worker hated and longed for."); STANLEY LIEBERSON, A PIECE OF THE PIE (1980) (focusing on particular hardships blacks faced compared to white ethnics); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1124 (1991) ("[W]hen the ingenious American devices for excluding blacks from society are contrasted with the assimilationist welcome accorded immigrants, one can quickly . . . formulate a sensible answer to the question that lies deep in many white minds: why can't blacks do what my immigrant ancestors did?").

[14]*See* A. LEON HIGGINBOTHAM, SHADES OF FREEDOM 91-93 (1996).

[15]From 1884-1900, there were over 2,500 lynchings, the great majority, blacks in the South. *See, e.g.*, JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM 282 (6th ed. 1988); *see also generally* RALPH GINZBURG, 100 YEARS OF LYNCHINGS (1988); JAMES ALLEN, ET AL., WITHOUT SANCTUARY (2000).

[16]*See, e.g.*, KLUGER, *supra* n. 8, at 59-60.

tests.[17] Consequently, blacks lacked the power to vote out the very governments that imposed the rigid hegemonic system that denied them resources and full citizenship.

A series of decisions by this Court ratified the denial to blacks of the rights of full citizenship. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court declared unconstitutional the Civil Rights Act of 1875, which had outlawed racial segregation in public accommodations. After more than two hundred years of systemic white supremacy, in which governmental resources had been routinely employed to perpetuate the institution of slavery, the Court held that any remedy for racial injustice was beyond Congress's power.[18] In *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court delivered the implicit deathblow to the civil rights of African Americans, with the "separate but equal" doctrine. This paved the way for the extension of white supremacy to all areas of social life, particularly education.

By 1900, every Southern state had enacted laws requiring separate schools for blacks and whites. As blacks migrated to the North in the first part of the twentieth century, they were

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[17]HIGGINBOTHAM, *supra* n. 14, at 174 (1996). As one Mississippi judge candidly commented, "there has not been a full vote and a fair count in Mississippi since 1875 . . . we have been preserving the ascendancy of white people by . . . stuffing the ballot boxes, permitting perjury and . . . carrying the elections by fraud and violence." *Id.*

[18]In language that resembles some of this Court's modern affirmative action jurisprudence, the Court observed:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

109 U.S. at 25.

urged, if not forced, to attend segregated schools. Indeed, for the first half of the twentieth century, the majority of African-American children were confined to impoverished, short-term schools. By 1930, $7 was spent for whites to every $2 spent for blacks.[19] These separate and unequal schools helped to perpetuate the mythology of white supremacy and paralyzed any hope of black advancement.

In higher education, the disingenuous creed of "separate but equal" restricted blacks to segregated institutions. *See Sweatt*, 339 U.S. 629; *Sipuel v. Okla. State Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). It was not until *Brown v. Board of Education*, 347 U.S. 483 (1954), decided two generations later, that this Court really began to undo this nation's sordid history of racial oppression. Even after this momentous decision, however, it would be years before many of this nation's elementary and secondary schools and colleges would readily open their doors to African Americans.[20]

Meanwhile, both before and after *Brown*, the federal government carried out a series of policies that created and

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[19]FRANKLIN & MOSS, *supra* n. 15, at 361-62.

[20]Until the passage of the 1964 Civil Rights Act, the Executive Branch had no power to enforce *Brown*'s mandate for school desegregation. By 1969, the federal government virtually ceased to exercise that power, once again leaving the responsibility for constitutional compliance to the courts. *Cf. Adams v. Richardson*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (observing the Executive Branch's considerable delay in enforcing the desegregation of higher learning institutions through Title VI). This Court's rulings rejecting metropolitan desegregation in *Milliken*, 418 U.S. 717, and financial equalization of schools in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), sharply restricted judicial authority as well. ERICA FRANKENBERG ET AL., HARVARD U., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS 8 (2003), *available at* http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf.

perpetuated a system of residential segregation, the effects of which are still manifest today.[21] Starting with the New Deal, "federal housing policies translated private discrimination into public policy"[22] and officially endorsed the discriminatory practices of real estate developers, banks, mortgage brokers, appraisers, and insurance agents.[23] Blacks were confined to overcrowded, overpriced, and deteriorating "ghettos" whose inferior services included inadequate, segregated schools.[24] Many black communities were completely isolated by an iron curtain of legally enforceable covenants on all sides, which created massive overcrowding, a "race tax" on housing prices, and deterioration of housing within predominantly black neighborhoods.[25] The sorry legacy of these policies persists long after the enactment of fair housing laws, as fears of the "black ghetto" contribute to racial discrimination and flight from integrated neighborhoods.[26]

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[21]*See* Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 801-06 (1996).

[22] *See* Expert Report of Thomas J. Sugrue, *Grutter v. Bollinger*, No. 97-75321 (E.D. Mich. December 15, 1998) at 27.

[23]*See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER 196-218 (1985).

[24]*See, e.g.*, CIVIL RIGHTS PROJECT, HARVARD U. & LEWIS MUMFORD CTR. FOR COMPARATIVE URBAN & REGIONAL RESEARCH, STATE U. OF NEW YORK AT ALBANY, HOUSING SEGREGATION 2-4 (2001), *available at* http://www.civilrightsproject.harvard.edu/research/metro/call_housinggary.php; Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION 291, 304-330 (Gary Orfield et al. eds., 1996).

[25]Orfield, *supra* n. 24, at 304.

[26]CIVIL RIGHTS PROJECT & LEWIS MUMFORD CTR., *supra* n. 24, at 2. Even after this Court outlawed restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the FHA Underwriting Manual cautioned against the

Through the 1960s, federal "urban renewal" strategies devastated black neighborhoods and pushed blacks further into racially isolated, economically depressed areas.[27] "Slum clearance" leveled black communities to produce new developments near downtown areas, and displaced black families into segregated housing markets. This has created new isolated pockets of poverty, reinforced racial ignorance and hostility against blacks, and set in motion a catastrophic economic avalanche that further circumscribed blacks' access to capital. The federal government's calculated involvement in these discriminatory housing policies not only reinforced already established patterns of racial isolation and subjugation, it lent them "a permanence never before seen" that "virtually constituted a new form of de jure segregation"[28] and contributed to the existing racial isolation in this country's schools.

Predominantly black or mixed-race neighborhoods seldom received federal mortgages and loan guarantees, a practice that continued into the 1970s. To this day, private banks patterned their lending policies after the FHA's discriminatory practices, which extended the reach of such practices deep into the private sector.[29] Private banks continue to prey on African American homeowners through "reverse redlining" practices that offer excessive loans at exorbitant fees. This has the effect of further

introduction of "incompatible" groups into a neighborhood and encouraged appraisers to rely on physical barriers to guarantee the separation of whites and blacks. *See, e.g.*, Orfield, *supra* n. 24, at 305; Sugrue, *supra* n. 22, at 27. These federal policies paved the way for violent assaults — including stone throwing, vandalism, arson, and physical attacks — on blacks who moved into white neighborhoods. Sugrue, *supra* n. 22, at 28.

[27] Orfield, *supra* n. 24, at 305-06.

[28] ARNOLD HIRSCH, MAKING THE SECOND GHETTO 254-55 (2d ed. 1998).

[29] *See, e.g.*, Sugrue, *supra* n. 22, at 27-28.

destabilizing black neighborhoods and impeding black economic development.[30]

These systemic government actions, in concert with discriminatory private behavior, continued to deny equal opportunity to African Americans. The combined force of public and private discrimination for more than 300 years has had a devastating impact on all aspects of black social, educational, political, and economic opportunity in America.

B. The Cumulative Effect of Generations of Racial Subordination and Continued Discrimination Has Produced Stark Inequality Which, By Any Measure, Leaves African Americans Significantly Disadvantaged

Race remains the critical dividing line in American society. More than 300 years of calculated and profound racial persecution by public and private actors have produced an entrenched racial hierarchy that pervades every facet of life in this country. Twenty-five years after the Court ruled in *Bakke* that race-conscious admissions policies were constitutionally permissible, some African Americans have made significant progress as a result of opportunities that were once denied. Nevertheless, widespread racial inequality remains a fundamental fact of American life, including for the current generation of college, graduate, and professional school applicants who have grown up in a deeply racially fragmented society. Until race ceases to be the barometer of economic, social, and political opportunity, it will continue to be an essential factor in higher education admissions.

[30] *See* CALVIN BRADFORD, CENTER FOR COMMUNITY CHANGE, RISK OR RACE? RACIAL DISPARITIES AND THE SUBPRIME REFINANCE MARKET (2002); *see id.* at vii ("Lower-income African-Americans receive 2.4 times as many subprime loans as lower-income whites, while upper-income African-Americans receive 3.0 times as many subprime loans as do whites with comparable incomes.").

The legacy of racial subjugation is acutely evident in the persistence of residential segregation. Where one lives affects one's schooling, peer groups, safety, job options, insurance costs, political clout, access to public services, home equity, and, ultimately, wealth.[31] While America has become increasingly racially diverse, blacks in major metropolitan areas continue to be extremely racially isolated in a manner unlike any other ethnic group in this country.[32] This is true for all black Americans, regardless of income level.[33] Even middle class black Americans tend to live in areas with a higher concentration of poverty, higher crime rates, and less access to services than white neighborhoods.[34] Blacks are also less likely

[31]DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 235 (1993).

[32]*See, e.g.*, JOHN ICELAND, ET AL., U.S. CENSUS BUREAU, RACIAL AND ETHNIC SEGREGATION IN THE UNITED STATES: 1980-2000 3-4 (2002); MASSEY & DENTON, *supra* n. 31, at 77.

[33]*See, e.g.*, MASSEY & DENTON, *supra* n. 31, at 84-87 (noting that blacks in Detroit are extremely racially isolated regardless of income); Douglas S. Massey & Mary J. Fischer, *Does Rising Income Bring Integration? New Results for Blacks, Hispanics, and Asians in 1990*, 28 SOC. SCI. RES. 316, 317 (1999) (finding that blacks "continue to lag well behind other groups in achieving integration, irrespective of social class."); MARY PATTILLO-MCCOY, BLACK PICKET FENCES 27 (1999) ("African Americans have long attempted to translate socioeconomic success into residential mobility, making them similar to other ethnic groups. They desire to purchase better homes, [to live in] safer neighborhoods, [and to attend] higher quality schools . . . with their increased earnings. . . . The black middle class has *always* attempted to leave poor neighborhoods, but has never been able to get very far.") (citation omitted).

[34]Camille Zubrinsky Charles, *Socioeconomic Status and Segregation: African Americans, Hispanics and Asians in Los Angeles, in* PROBLEM OF THE CENTURY 284-85 (Elijah Anderson & Douglas S. Massey eds., 2001). *See also* GARY ORFIELD, HARVARD U., SCHOOLS MORE SEPARATE 11, 17 (2001) ("Even most of the middle class minority families who move their children to the suburbs find themselves in heavily minority schools, often

to own homes than whites. While home ownership increased to an overall rate of 66.8% in 1999, a disparity of 26% remained between black and white ownership rates.[35]

In Michigan, the vast majority of whites and blacks live in separate worlds. In 2000, Detroit ranked as *the* most racially segregated city of the 50 largest metropolitan areas in this nation.[36] Within the last decade, four other Michigan metropolitan areas have ranked in the nation's top twenty-five most racially segregated urban areas.[37] This extreme racial isolation is a direct result of a history of state-backed discriminatory policies and practices,[38] and continuing private

schools with limited educational success."); Richard D. Alba et al., *How Segregated are Middle-Class African Americans?* 47 SOC. PROBS. 543, 556 (2000) ("At no point do blacks attain residential parity with whites—that is, the communities in which they reside have less affluence and other less desirable characteristics (e.g., more crime) than the communities where whites with similar personal and household characteristics are found."); John R. Logan & Brian J. Stults, *Racial Differences in Exposure to Crime: The City and Suburbs of Cleveland in 1990*, 37 CRIMINOLOGY 251, 270 (1999) (concluding that residential segregation restricts *affluent* African Americans to neighborhoods with "more than double the violent crime rate to which *poor* whites are exposed.").

[35]GEORGE S. MASNICK, HARVARD U., HOME OWNERSHIP TRENDS AND RACIAL INEQUALITY IN THE UNITED STATES IN THE TWENTIETH CENTURY, 22, 24 (2001) *available at* http://www.jchs.harvard.edu/publications/homeown/masnick_w01-4.pdf.

[36]Leland Ware & Antoine Allen, *The Geography of Discrimination: Hypersegregation, Isolation and Fragmentation Within the African-American Community, in* THE STATE OF BLACK AMERICA 2002 69, 74 (Lee A. Daniels ed., 2002).

[37]Sugrue, *supra* n. 22, at 22.

[38]As Detroit's white population suburbanized, opposition to racial diversity reached into suburban communities. In Dearborn, city officials collaborated with real estate firms to fight against mixed-income housing which, they asserted, would become a "dumping ground" for blacks and other minorities. Today, Dearborn is predominantly white, while Detroit,

discrimination.[39]

Such persistent racial segregation has had profound consequences for black Americans, particularly in the area of education. Fifty years ago, *Brown* signaled the promise of a more racially inclusive society; today, however, we are more than a decade into the continuous *resegregation* of American public schools. The racial isolation of black students has increased to levels not seen in three decades. The nation's largest city school systems are, almost without exception, overwhelmingly nonwhite. White students are the most segregated; on average, they attend schools where eighty percent of the student body is white.[40]

This racial balkanization of American schools is a direct result of the deeply rooted racial caste system that continues to permeate our society and to wreak havoc on the life opportunities of black children. This Court correctly ruled 50 years ago in *Brown* that "separate is inherently unequal." Yet, one-sixth of all black students in the nation and one-fourth of black students in the Northeast and Midwest are educated in virtually all-non-white schools that have concentrations of enormous poverty and very limited resources.[41] Segregated schools have lower average test scores, fewer qualified teachers, and fewer advanced courses.[42] Many black students, regardless of their family income, have markedly diminished

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its neighbor, is predominantly black. *See* Sugrue, *supra* n. 22, at 29.

[39]Ware & Allen, *supra* n. 36, at 76 (at least one in four blacks seeking housing today can expect to encounter some form of housing discrimination).

[40]FRANKENBERG ET AL., *supra* n. 20, at 4-5.

[41]*Id.* at 5.

[42]*Id.* at 11.

opportunities for educational, social, and economic advancement.[43] The same cannot be said for the majority of poor white Americans.[44]

The persistence of residential segregation and these disparate educational opportunities are compounded by the continued exclusion of African Americans from full participation in the political process. Even today, racially polarized voting remains as pervasive in many parts of the country[45] as it was almost forty years ago when Congress enacted the Voting Rights Act of 1965, 42 U.S.C. § 1973 (2002), for the purpose of dismantling the many invidious practices that denied the franchise to black voters.[46]

The specter of apartheid also haunts African Americans' opportunity for occupational advancement. The risk of unemployment looms larger for African Americans than for whites, both in good economic times and in bad.[47] Despite the

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[43]These inequalities also extend to the treatment of black and white youth in the criminal justice system. Young blacks who are arrested and charged with a crime are more than six times more likely to be sentenced to prison than similarly situated whites. MANNING MARABLE, THE GREAT WALLS OF DEMOCRACY 158 (2002).

[44]Gary Orfield, *The Growth of Segregation, in* DISMANTLING DESEGREGATION, *supra* n. 24, at 53 (most segregated African-American and Latino schools are dominated by poor children, but 96 percent of white schools have middle-class majorities).

[45]Even after the most recent round of redistricting, there continue to be judicial findings of "highly racially polarized voting." *See, e.g.*,*Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 88 (D.D.C. 2002), *prob. juris. noted*, 71 U.S.L.W. 3486, 2003 D.A.R. 698 (U.S. 2003).

[46]*See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09, 315 (1966) (describing the purpose of the Voting Rights Act); *Beer v. United States*, 425 U.S. 130, 140 (1976) (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 57-58 (1975)) (same).

[47] For example, while the white male unemployment increased from 4.6

enactment of federal and state anti-discrimination laws, employment discrimination against African Americans still exists across all regions, in all industries and in all occupations, affecting as many as 2 million minority and female workers.[48] For the 2002 year, both the mean and median weekly earnings of whites exceeded those of blacks in virtually every occupational group.[49] All factors being equal, blacks on average are less likely to receive job offers than whites.[50] This discrimination exacerbates the barriers already created by segregated social networks and informational bias that infects employment opportunity for blacks.[51] Access to the highest

to 4.9 percent during the period from January, 2002 to January, 2003, black male unemployment jumped from 8.8 to 10.3 percent over the same time period. As of January, 2003, black teenage unemployment stood at 30.4% compared to 15.2 for comparably aged whites. U.S. BUREAU OF LABOR STATISTICS, TABLE A-2, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY RACE, SEX AND AGE, (2003) *available at* http://www.bls.gov/news.release/ empsit.t02.htm.

[48]ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999, 230 (1999) available at http://www. eeo1.com/1999_NR/ Chapter17.pdf.

[49]OFFICE OF EMPLOYMENT AND UNEMPLOYMENT STATISTICS, U.S. BUREAU OF LABOR STATISTICS, TABLE A-19, USUAL WEEKLY EARNINGS OF EMPLOYED FULL-TIME WAGE AND SALARY WORKERS BY OCCUPATION, SEX, RACE AND HISPANIC ORIGIN, 2002 ANNUAL AVERAGES, at 13-16, 25-28. (Unpublished and available by contacting Bureau of Labor Statistics).

[50]Harry J. Holzer, *Race Differences in Labor Market Outcomes Among Men, in* 2 AMERICA BECOMING 106 (Neil J. Smelser et al. eds., 2001); Ronald B. Mincy, *The Urban Institute Audit Studies*, in CLEAR AND CONVINCING EVIDENCE 173-74 (Michael Fix & Raymond J. Struyk, eds. 1993).

[51]Jomills Henry Braddock II & James M. McPartland, *How Minorities Continue to be Excluded from Equal Employment Opportunities*, 43 J. OF SOC. ISSUES 27 (1987); *see also* Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q. J. OF ECON. 835-67 (1998).

paying occupations is also much more restricted for African Americans than whites both in terms of the range of positions available, compensation, and the educational and experience requirements for selection.[52] Such racial discrimination persists across all class levels and affects even those African Americans with advanced skills and credentials.[53]

Despite modest economic progress, the black middle class still lags overwhelmingly behind their white counterparts in income and occupational status. The salience of race, over class, in determining socioeconomic mobility became more pronounced in the 1980s when "60 percent of whites but only 36 percent of African Americans from upper-white-collar backgrounds were able to maintain their parents' occupational status." Lower middle class whites also proved more upwardly mobile, with more than half finding their way into upper middle class jobs, "compared to only 30 percent of blacks." African Americans were also more downwardly mobile.[54]

[52]Marlese Durr & John R. Logan, *Racial Submarkets in Government Employment*, 12 SOC. F. 353-70 (1997); Sharon M. Collins, *The Marginalization of Black Executives*, 36 SOC. PROBS. 317-31 (1989); Sharon M. Collins, *Blacks on the Bubble*, 34 SOC. Q. 429-47 (1993); Melvin E. Thomas, *Race, Class and Personal Income*, 40 SOC. PROBS. 328, 339-40 (1993); Melvin E. Thomas et al., *Discrimination Over the Life Course*, 41 SOC. PROBS. 608-28 (1994); George Wilson et al., *Reaching the Top: Racial Differences in Mobility Paths to Upper-Tier Occupations*, 26 WORK & OCCUPATIONS 165, 166, 175 (1999).

[53]MARIANNE BERTRAND & SENDHIL MULLAINATHAN, ARE EMILY AND BRENDAN MORE EMPLOYABLE THAN LAKISHA AND JAMAL? A FIELD EXPERIMENT ON LABOR MARKET DISCRIMINATION, 1, 14-15 (2002) *available at* http://gsb.uchicago.edu/pdf/bertrand.pdf.

[54]*See, e.g.*, MARY PATTILLO-MCCOY, *supra* n. 33, at 21; *see id.* ("In income, the gap between what whites earn and what African Americans earn has not shown signs of narrowing since the early 1970s. For younger workers, the gap may in fact be increasing. The reversal of the trend toward earnings equality is especially pronounced among college-educated African Americans, partly because of their concentration in declining sectors of the

By 1995, the percentage of black workers in middle class occupations had grown to half, "while 60 percent of whites had middle class jobs." Yet even these figures mask the significant differences in occupational distribution between the black and white middle class, with blacks tending to occupy lower paying jobs with less prestige.[55]

Not surprisingly, this lack of black occupational opportunity has resulted in continued racial disparities in access to capital and in the accumulation of wealth. As of 2000, 22.1% of African Americans lived below the federal government's poverty line, compared to 7.5% of white non-Hispanics.[56] Between 1984 and 1999, the mean household wealth for white families increased from $51,600 to $103,600; for black families, it rose from a meager $6,100 to $9,100.[57]

African Americans also suffer from less adequate health services and treatment relative to whites. This is true across a variety of medical conditions, and occurs independently of insurance status, income, and education, among other factors that influence access to healthcare. These disparities are markedly present in the care that African Americans receive for cardiovascular conditions, various cancers, strokes, kidney disease, HIV/AIDS, diabetes, and mental health. Moreover, these disparities are associated with greater mortality among African-American patients.[58] African Americans experience

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economy . . . .").

[55]MARY PATTILLO-MCCOY, *supra* n. 33, at 21-22.

[56]JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES, 2000 4 (2001).

[57]Joseph Lupton & Frank Stafford, *Household Financial Wealth, (Thousands of 1999 Dollars)*, Institute for Social Research (Jan. 2000), *available at* http://www.isr.umich.edu/src/psid/wealthcomp.pdf.

[58]BRIAN D. SMEDLEY ET AL., INSTITUTE OF MEDICINE OF THE NAT'L

infant morality rates two to three times that of whites and have a lower life expectancy.[59]

Despite significant progress by some African Americans, the chasm between blacks and whites remains enormous.[60] In the absence of slavery, *de jure* segregation and persistent "societal discrimination," this generation of applicants might have lived in a society where 700,000 more African Americans have jobs, and nearly two million more African Americans hold higher paying and managerial jobs. They might have lived in a society where the average African-American household earns 56% more than at present, and altogether, African-American households earn another $190 billion.

Similarly, the wealth of black households would have risen by $1 trillion. African Americans might have had $200 million more in the stock market, $120 billion more in our pension plans, and $80 billion more in the bank. African Americans could have owned over 600,000 more businesses, with $2.7 trillion more in revenues. There might have been 62 African Americans running Fortune 500 companies, rather than three. Two million more African Americans could have high school diplomas, and nearly two million more could have undergraduate degrees. Close to a half-million more could have master's degrees. If racial disparities did not exist in health

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ACADEMIES, UNEQUAL TREATMENT, 42-79, 59 (blacks less likely to be found eligible for transplants, to appear on transplant waiting lists, and to undergo transplant procedures, even after controlling for patients' insurance and other factors) (2003).

[59]NATIONAL CENTER FOR HEALTH STATISTICS, DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Table 23, Infant Mortality Rates, Fetal Mortality Rates, and Perinatal Mortality Rates, According to Race* (2001), *available at* http://www.cdc.gov/ nchs/data /hus/tables/2001/01hus023.pdf.

[60]*See* Janice F. Madden, *Do Racial Composition and Segregation Affect Economic Outcomes in Metropolitan Areas?, in* PROBLEM OF THE CENTURY, *supra* n. 34, at 314.

insurance rates, 2.5 million more African Americans, including 620,000 children, could have health insurance. Three million more African Americans might have owned homes.[61]

The inescapable conclusion is that this is not a "color blind" society where opportunity is singularly determined according to individual ability. Rather, it is a socially-constructed racial hierarchy with whites firmly on top. The only other conceivable explanation — that this gross inequality is the consequence of a natural order of black inferiority and white supremacy — is, of course, wholly unacceptable.[62]

III. The Fourteenth Amendment Should Not Be Interpreted to Frustrate Voluntary State Efforts, Using Race-Conscious Remedies, to Eliminate the Continuing Effects of State-Sponsored Discrimination.

As detailed above, this country faces a crisis of racial inequality, which has had the ripple effect of removing untold numbers of African Americans from the pool of individuals

[61] FRANKLIN D. RAINES, *What Equality Would Look Like, in* THE STATE OF BLACK AMERICA, *supra* n. 36, at 17-20. Of course, no one would expect exact parity even in the absence of discrimination. But, the magnitude of the difference between actual conditions and any rough estimates of parity suggests the kind of "manifest imbalance" that this Court has found appropriate for race conscious remedies. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987); *see also*, *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 14 (1977).

[62] This was the view Justice Harlan in fact endorsed in his famous *Plessy* dissent:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Plessy, 163 U.S. at 559.

eligible to compete for admission to selective institutions of higher education, including the University of Michigan. *See, e.g.*, *Bakke*, 438 U.S. at 370-71 (Opinion of Brennan, White, Marshall & Blackmun, JJ.). It has also provided unfair advantages to whites as a group, who have disproportionately benefitted from the racialized dimensions of economic, political, and social opportunity in our country.[63] This systemic and systematic racial inequality, from cradle to grave, makes consideration of race not only relevant, but *essential*, to public institutions in today's society.

Yet the Court's jurisprudence, especially its ruling in *Bakke*, has dismissed this rooted inequality as "societal discrimination" that is beyond the power of state actors to remedy. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Bakke*, 438 U.S. at 307. This makes it virtually impossible for a public institution voluntarily to take account of race, short of implicating itself in identified racial discrimination, which such institutions, concerned about their own liability, are frequently unwilling to do. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 274, 291 (1986) (O'Connor, J., concurring) (public employers might be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken . . . and liability to non-minorities if affirmative action *is* taken"). The inability of state and local institutions to act voluntarily to relieve this continuing disparity threatens to relegate African Americans to a permanent third class status, without legally cognizable means for redressing systemic racial disadvantage brought on by such institutions throughout hundreds of years of slavery, segregation, and discrimination. It further threatens to create a permanent drain on this country's pool of potential talent and, ultimately, to produce a society forever divided by race. As

[63] *See generally*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Barbara J. Flagg, *"Was Blind, But Now I See,"* 91 MICH. L. REV. 953 (1993).

Justice Marshall concluded in *Bakke*:

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

438 U.S. at 396 (Opinion of Marshall, J.). The Court's unwillingness to endorse race-conscious remedies aimed at mitigating the pernicious effects of widespread discrimination is contrary to the purpose and spirit of the Fourteenth Amendment. *See id.* ("I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination . . . ."); *id.* at 407 (Opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetrate racial supremacy.").

A. The Persistence of Pervasive Racial Inequality Calls For the Court to Revisit its Conclusion In *Bakke* That Redressing "Societal Discrimination" Is Not A Compelling Interest

In an opinion authored by Justice Powell, a majority of the Court in *Bakke* rejected the University of California at Davis Medical School's use of race to redress the effects of "societal discrimination," which it deemed "an amorphous concept of injury that may be ageless in its reach into the past."[64] 438 U.S.

[64]The Court's rejection of the goal of eliminating "societal discrimination," however, was far from unanimous. Four Justices expressly repudiated this view. Justices Brennan, White, Marshall, and Blackmun dissented from that part of the Court's judgment holding the UC Davis plan unconstitutional, concluding that the University could consider race to counter the lingering effects of "societal discrimination." *Bakke*, 438 U.S. at 362-73.

at 307. In the "absence of judicial, legislative, or administrative findings of constitutional or statutory violations," *id.*, the Court concluded that it could not sanction a classification aimed at assisting "persons perceived as members of relatively victimized groups at the expense of other innocent individuals," *id.*

None of the opinions that emerged from *Bakke* defined "societal discrimination." Nor has the Court defined it since. *Cf. Croson*, 488 U.S. 469; *Wygant*, 476 U.S. 274. But it has placed beyond the scope of constitutionally permissible remedies a range of actions taken by state actors to redress the cumulative effects of past discrimination. Thus, for example, in *Wygant* the Court disapproved a school board's race-based layoff policy that aimed to create a more diverse faculty, in order to have role models for minority students, in the absence of "some showing of prior discrimination by the governmental unit involved." 476 U.S. at 274. Similarly, the Court in *Croson* rejected an ordinance adopted by the Richmond City Council that required set-asides to minority-owned businesses in part because findings by the City Council concerning the deep disparity between the share of contracts awarded minority-owned businesses and the size of Richmond's minority population were held insufficient. 488 U.S. at 501. The local government could act, the Court determined, only to "eradicate the effects of private discrimination within its own legislative jurisdiction." *Id.* at 491-92.[65]

At the same time, efforts to hold state and local institutions accountable for the consequences of their past discrimination

[65]The Court concluded that a state actor could also act to redress its "passive participation" in a "system of racial exclusion practiced by elements of the local construction industry . . . ." *Id.* at 492.

have been hobbled by courts' determinations that the effects of such discrimination are too "attenuated" or "amorphous" to justify race-conscious remedies, and that racially segregated systems are the product of private choices, rather than state action, and, therefore, are not legally redressable. *See, e.g.*, *Freeman*, 503 U.S. at 494-95; *cf. Jenkins*, 515 U.S. 70; (limiting federal courts' remedial authority in school desegregation cases); *Dowell*, 498 U.S. at 250-51 (Opinion of Marshall, Blackmun, and Stevens, JJ). (school board released from desegregation decree following period of compliance could adopt student assignment plan that resulted in reappearance of all-black schools in absence of a showing that decision to implement plan was intentionally discriminatory); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Milliken*, 418 U.S. 717; *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001); *Manning v. Sch. Bd. of Hillsborough County*, 244 F.3d 927 (11th Cir. 2001). These decisions have the effect of sanctioning a range of outcomes that originated with state and local actors and continue to perpetuate racial disadvantage. *See, e.g.*, *Dowell*, 498 U.S. at 251 (dissenting opinion)(school board maintained original dual system by "exploiting residential segregation").

The combined impact of the Court's Fourteenth Amendment jurisprudence has been to squeeze both ends against the middle — shielding from constitutional scrutiny policies which, though neutral on their face, have a disproportionate adverse impact on African Americans, *see, e.g.*, *Village of Arlington Heights v. Metropolitan Hous. Auth.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976); *cf. Personnel Admin'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (Equal Protection violation exists only if state policy was adopted because of, rather than merely in spite of, its disparate impact on suspect class); *Rodriguez*, 411 U.S. 1 (state method of financing education through property taxes held not to violate Equal Protection Clause despite significant adverse impact on poor children), while at

the same time barring affirmative measures taken to alleviate the impact of systemic racial inequality, *see Croson*, 488 U.S. 469; *Wygant*, 476 U.S. 274; *Bakke*, 438 U.S. 265.[66]

It is ironic, moreover, that the Fourteenth Amendment has been interpreted to hamstring voluntary state efforts to compensate for past discrimination, considering that state actors have been the most determined to frustrate the mandate of *Brown*. Well after the Court's decision in *Brown*, Southern states continued their vocal opposition to measures to ensure black equality, *see, e.g.*, *Dowell*, 498 U.S. at 252-56 (Marshall, J., dissenting) (describing efforts by Oklahoma school authorities to evade *Brown*'s dictates); *Cooper v. Aaron*, 358 U.S. 1, 11 (1958) (Arkansas); *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961) (black candidates categorically excluded from University of Georgia on basis of race), and vestiges of these dual systems have persisted decades after *Brown* was decided. *See United States v. Fordice*, 505 U.S. 717 (1992); *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994). Massive campaigns to limit the rights of African Americans also existed in Northern states. *See Bakke*, 438 U.S. at 393-94 (Marshall, J. concurring in part, dissenting in part). Thus, it is inconceivable that state actors should be barred from taking voluntary, race-sensitive measures to eliminate vestiges of their earlier intransigence. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is

[66]The perception of whites as "innocent" victims of affirmative action, *see Bakke*, 438 U.S. at 307, has encouraged this result. *Cf.* Harris, *supra* n. 63, at 1767-68 ("The Supreme Court's rejection of affirmative action programs on the grounds that race-conscious remedial measures are unconstitutional under the . . . Fourteenth Amendment . . . is based on the Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks. As a result, the parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites.").

designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

The history of racial caste in this country further calls into question the appropriateness of the Court's decisions to limit the constitutional authority of state and local actors to remedy pervasive racial disadvantage. Although the Court has determined that the rights created by the Fourteenth Amendment "are, by its terms, guaranteed to the individual" and "are personal rights," *Bakke*, 438 U.S. at 289, the oppression of African Americans has been distinctly group-based.[67] As Justice Marshall observed in his *Bakke* opinion:

> [I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. [This] ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.

Id. at 400. Justice Marshall's observation is as relevant today as it was twenty-five years ago when *Bakke* was decided. *See, e.g.*, *Freeman*, 503 U.S. at 490; *Grutter v. Bollinger*, 288 F.3d 732, 765 (2002) (opinion of Clay, J., concurring). This country has made remarkable strides toward realizing the promise of the Fourteenth Amendment, but it has yet to reach that goal. *See Croson*, 488 U.S. at 561-62 (Blackmun, J., dissenting) (expressing confidence that the Court would again do its best to fulfill the promises of the Constitution). Until that time, race-sensitive policies that take into account the unique experiences and opportunities of African Americans are both necessary and appropriate.

[67] *See, e.g.*, Cass R. Sunstein, *The AntiCaste Principle*, 92 MICH. L. REV. 2410 (1994).

B. A Principal Purpose of the Fourteenth Amendment Was to Constitutionalize Race-Conscious Remedies[68]

The legislative history of the Fourteenth Amendment establishes that one of its chief objectives was to secure the constitutionality of race-conscious legislation enacted by the Thirty-ninth Congress.[69] This Court should not, therefore, interpret this Amendment to bar the very kinds of race-specific remedial measures it was designed to authorize and legitimate.

Following the Civil War, Congress proposed a series of race-specific social welfare laws and programs specifically targeting blacks for special assistance.[70] Many of these

[68] The historical circumstances surrounding the enactment of the Fourteenth Amendment have been recounted elsewhere at great length. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 61 VA. L. REV. 753, 754-88 (1985); Brief for the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* in *Bakke* (hereinafter "LDF's *Amicus* Brief in *Bakke*"), 10-53; *see also* JACOBUS TENBROEK, EQUAL UNDER LAW (rev. ed. 1965); ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES (rev. ed. 1974); HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908). Several of the opinions in *Bakke* acknowledged the relevance and importance of the history of the Fourteenth Amendment. *See* 438 U.S. at 291-294 (Opinion of Powell, J.); *id.* at 396-398 (Opinion of Marshall, J.).

[69] "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." TENBROEK, *supra* n. 68, at 201; *see also* FLACK, *supra* n. 68, at 11; *Bakke*, 438 U.S. at 398 (Marshall, J., concurring in part, dissenting in part) ("Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit race-conscious relief measures.").

[70] *See e.g.*, the 1865 Freedmen's Bureau Act, Act of Mar. 3, 1865, c.90, 13 Stat. 507-508; the 1866 Freedmen's Bureau Act, Act of July 16, 1866, c. 200, 14 Stat. 173-177; the 1867 Colored Servicemen's Claims Act, 15 Stat. 26, Res. 25.

programs were intended to benefit all blacks — not just recently freed slaves — often to the exclusion of whites. The distinctions made within such programs on the basis of race were neither inadvertent nor unopposed; on the contrary (see the description of the legislative history contained in Appendix "A" to this Brief), they were debated and enacted in the face of opposition to the very idea of race-conscious programs by those who perceived such measures as unfair to whites.

It was against the backdrop of the affirmative remedial measures that the Thirty-ninth Congress concomitantly fashioned, debated, and approved the Fourteenth Amendment.[71] Virtually all of the members who supported the Amendment also voted in favor of the Freedmen's Bureau legislation.[72] The Amendment's proponents viewed the 1866 Freedmen's Bureau bill to be precisely the kind of measure for which the Amendment would provide clear constitutional authority.[73] Therefore, the *original* understanding of the Fourteenth Amendment supports a broad remedial consideration of race and cannot provide the basis for striking down state-sponsored policies conceived to improve the conditions of blacks.

Conclusion

For the foregoing reasons, the judgment of the court below should be affirmed.

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[71] *See* CONG. GLOBE, 39th Cong., 1st Sess. (hereinafter "GLOBE") 2545 (House vote, 128-37); *id.* at 3042 (Senate vote, 33-11); *id.* at 3149 (House concurrence with Senate amendments, 120-32); *id.* at 3562 (House vote on conference report, 25-102 defeating the motion to table).

[72] *See* Schnapper, *supra* n. 68, at 784 n.167 (describing cross-over voting in both Houses).

[73] *See, e.g.*, GLOBE at 1033-34 (statement of Representative Woodbridge); *id.* at 1092 (statement of Representative Bingham).

Respectfully submitted,

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APPENDIX "A"
Legislative History of Freedmen's Bureau Acts And Similar Legislation

Principal among the legislation passed during this period was the 1866 Freedmen's Bureau Act, Act of July 16, 1866, c. 200, 14 Stat. 173-177, by far the most comprehensive of the remedial measures enacted during the Reconstruction Period. During the congressional debates over the 1866 Act, it became clear that much of the additional assistance and protection that Congress intended to provide through the Bureau would be directed not toward white war refugees, but rather toward newly freed blacks almost exclusively.[1]

Throughout the early debates over the first version of the bill, opponents complained, *inter alia*, that the proposed limitations on the Bureau's assistance would inappropriately make "a distinction on account of color between the two races;"[2] that it would result in two separate legal regimes — "one government for one race and another for another;"[3] and that it would impose "injustice and oppression upon the white people of the late slave-holding states for the benefit of the free negroes."[4] The bill's proponents took head on the challenge of defending the propriety of race-conscious legislation, and the

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[1]*See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. (hereinafter "GLOBE") App. 78 (remarks of Representative Chanler).

[2]*Id.* at 397 (remarks of Senator Wiley); *see also id.* at 342 (remarks of Senator Cowans); 544 (remarks of Representative Taylor); App. 82 (remarks of Representative Chanler).

[3]*Id.* at 627 (remarks of Representative Marshall), 634 (remarks of Representative Ritter).

[4]*Id.* at 402 (remarks of Senator Davis); *see also id.* at 251 (remarks of Senator Moccill); 415 (remarks of Senator Davis).

strong need for such special treatment.[5] On the strength and numbers of these arguments, the House and Senate both passed the 1866 Freedmen's Bureau bill, not once, but twice — with only slight modifications the second time.

Despite Congress's overwhelming support for it, the bill was twice vetoed by President Johnson. On both occasions, the President, as had many of the bill's congressional opponents, expressed grave doubts about the propriety and constitutionality of legislation that specially identified blacks for certain aid and programs.[6] The second time he exercised his veto, however, Congress, which had consistently rejected such arguments, did so again, voting to override it by a substantial margin.[7]

The years that followed witnessed the passage of more race-conscious legislation.[8] As before, objections were raised on each occasion about the race-specific nature of the proposed measures, but as with the 1866 Freedmen's Bureau Act, Congress found these arguments unpersuasive and passed most of the bills by substantial margins.[9]

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[5]*See id.* at 631-32 (emphasis added) (Representative Moulton); *see also id.* at App. 75 (remarks of Rep. Phelps).

[6]VIII MESSAGES AND PAPERS OF THE PRESIDENTS, 3599 (1914) (statements made by President Johnson justifying his veto of the bill).

[7]The House voted 104 to 33 to override the veto, and the Senate voted the bill into law by a margin of 33 to 12. GLOBE at 3840, 3850.

[8]*See, e.g.,* 14 Stat. Res. 86 (1866) (protecting black solders from unscrupulous claim agents); 15 Stat. Res. 4 (1867) (providing relief to blacks in the District of Columbia); 15 Stat. Res. 28 (1867) (authorizing the Secretary of War to provide Bureau funds to black freedmen to prevent famine resulting from crop failure).

[9]*See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 61 VA. L. REV. 753, 775-83 (1985) (recounting debate over these measures).